

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

C.W.P. No. 17110 of 2007

Date of Decision: 6.11.2007

Sat Paraksh and others

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. A.C. Jain, Advocate,
for the petitioners.

JUDGMENT

M.M. KUMAR, J.

This petition filed under Article 226 of the Constitution prays for quashing notice dated 25.5.2007 (P-5), issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the Act') issued by the respondent bank for recovery of sum of Rs. 9,08,908/- as on 30.4.2007 with further interest. A further prayer has also been made for quashing of notice dated 18.10.2007 (P-9), issued by the respondent bank in exercise of powers under Section 13(4) of the Act read with Rule 8 of the Security Interest (Enforcement) Rules,

2002. In pursuance to later notice, possession of immovable property measuring 1½ marlas, bearing No. N.F. 18, situated at Qila Mohalla, Jalandhar in the name of Smt. Kamna Dhingra, has been taken over.

Brief facts of the case are that the petitioners were partners of firm M/s Vinay Pharmaceutical and opened a current account bearing No. 22 with over draft facility against three FDRs, amounting to Rs. 95,000/-, with the respondent bank through petitioner No. 1. The aforementioned firm was dealing in the trading, sale and purchase of medicines etc. In October, 2000, due to non-renewal of the licence of the firm, the petitioners closed the business and the licence of the firm expired on 31.12.2000 [P-1 (Colly)]. It is claimed that the petitioners approached the respondent bank in order to settle the dues of the firm. The respondent bank already adjusted the amount of FDRs against the overdraft taken by the firm. On 21.8.2002, the respondent-bank initiated arbitration proceedings before the Additional Registrar, Cooperative Society, Jalandhar, for recovery of Rs. 5,68,379.64 on the basis of pronote dated 11.8.2001, for a sum of Rs. 3,77,704.64. In this manner, the respondent-bank added a sum of Rs. 76,349/- towards interest and cost of Rs. 1,13,676/-. The petitioners filed their objections before the Arbitrator raising objections regarding maintainability of the arbitration proceedings under Sections 55 and 56 of the Punjab Cooperative Societies Act, 1961 as well as with regard to rate of interest and cost levied by the respondent-bank. It is claimed that the arbitration proceedings were purposely delayed by the respondent-bank by seeking numerous adjournments and even dismissed in default on two

occasions firstly on 7.7.2003 and thereafter vide order dated 29.9.2003 (P-4). Then order dated 29.9.2003, was challenged by the respondent-bank before the Registrar, Cooperative Societies, Jalandhar and the same was remanded back to the Additional Registrar, Cooperative Societies, Jalandhar. The arbitration proceedings are stated to be still pending before the Arbitrator.

It was during arbitration proceedings that the respondent-bank has issued a notice dated 25.5.2007 (P-5), under Section 13(2) of the Act asking the petitioners to discharge their liability within sixty days otherwise the respondent bank was entitled to exercise all or any of the rights under Section 13(4) of the Act. The petitioner replied to the above notice by stating that no action under Section 13 of the Act could be taken as already the respondent bank has availed the remedy of initiating arbitration proceedings for recovery of the due amount (P-6). The respondent bank vide letter dated 30.7.2007 replied to the petitioners that they can take action under the Act (P-7). Apprehending action under Section 13(4) of the Act, the petitioners approached this Court by filing C.W.P. No. 15377 of 2007, which was dismissed as withdrawn vide order dated 4.10.2007 (P-8). On 18.10.2007, the respondent-bank issued notice under Section 13(4) of the Act (P-9), which is subject matter of challenge in the instant petition alongwith earlier notice dated 25.5.2007 (P-5).

Mr. A.C. Jain, learned counsel for the petitioners, has argued that the provisions of Section 36 of the Act provide for a complete bar on the secured creditor to make a claim of time barred

debt. According to the learned counsel the provision of Limitation Act, 1963 would apply to find out as to whether the debt is time barred. In that regard learned counsel has placed reliance on Article 62 of the Limitation Act, 1963, which provides for a period of 12 years to enforce payment of money secured by mortgage. According to the learned counsel the time runs from the date when the money becomes due and in the present case it has already expired. He has pointed out that commencement of proceedings before the Arbitrator cannot be considered assertion of claim for considering the period of limitation provided by Section 36 of the Act for initiation of action under Section 13(4) of the Act. Learned counsel has placed reliance on a Division Bench judgment of Orissa High Court in the case of **Indumati Pattanaik v. Chief Manager and Authorised Officer Bank of India IV, (2005) BC357 (DB)(Orissa)**. He has also submitted that the petitioners are without any remedy and after issuance of notice under Section 13(4) of the Act, possession of their property would be taken over.

We have thoughtfully considered the submissions made by the learned counsel for the petitioners and express our inability to accept the same. Firstly, the provisions of Section 13(4) postulates for an additional remedy, which is not alternative to any other remedy as has been held by Hon'ble the Supreme Court in the case of **M/s Transcore v. Union of India, AIR 2006 SC 712**. The observations of their Lordships reads as under:

“These are some of the factors which the Authorised Officer of the bank/FI has to keep in mind when he gives

notice under Section 13(2) of the NPA Act. Hence, equity, exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mis-match between the asset-liability in the books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of NPA Act, which measures are not contemplated by DRT Act and, therefore, it is wrong to say that the two Acts provide parallel remedies as held by the judgment of the High Court in M/s. Kalyani Sales Co. As stated, the remedy under DRT Act falls short as compared to NPA Act which refers to acquisition and assignment of the receivables to the asset reconstruction company and which authorizes banks/FIs to take possession or to take over management which is not therein the DRT Act. It is for this reason that NPA Act is treated as an additional remedy (Section 37), which is not inconsistent with the DRT Act.”

The question regarding limitation cannot be gone into in proceedings under Article 226 of the Constitution. It is well settled that the question of limitation is a mixed question of fact and law. It is not possible for us to give a positive conclusion that the debt is barred

by time because there may be acknowledgment on the part of the petitioners or there may be a running account which may sound into different results. Moreover, in the present case the amount was secured by mortgaging property in the year 2000, which would not prima facie establish that the action is barred by period of limitation. It is for this reason that the question of limitation has to be considered necessarily as the question of fact or at best the mixed question of fact and law. We further find that there is no equity in favour of the petitioners. It is well settled that whosoever comes to equity is expected to do equity himself. Therefore, the equitable jurisdiction of this Court under Article 226 of the Constitution would not be available. All these questions have been considered by this Court in C.W.P. No. 6959 of 2007, decided on 1.10.2007 and C.W.P. No. 2511 of 2007, decided on 13.11.2007. Both the cases have been decided against the borrower-cum-mortgagor.

The judgment of the Division Bench in the case of Indumati Pattanaik (*supra*) on which reliance has been placed by the petitioners would not be applicable to the facts of the present case.

For the reasons aforementioned, this petition fails and the same is dismissed. However, it is made clear that any observation made in this order shall not be construed as an expression of opinion on merits of the controversy by the Arbitrator where arbitral proceedings are pending.

M.M. KUMAR)
JUDGE

November 6, 2007

**(AJAY KUMAR MITTAL)
JUDGE**

Pk Kapoor